The Social Contract and Constitutional Republics

Between 1787 and 1791 the Framers of the U.S. Constitution established a system of government upon principles that had been discussed and partially implemented in many countries over the course of several centuries, but never before in such a pure and complete design, which we call a *constitutional republic*. Since then, the design has often been imitated, but important principles have often been ignored in those imitations, with the result that their governments fall short of being true republics or truly constitutional. Although these principles are discussed in civics books, the treatment of them there is often less than satisfactory. This essay will attempt to remedy some of the deficiencies of those treatments.

The Social Contract and Government

The fundamental basis for government and law in this system is the concept of the *social contract*, according to which human beings begin as individuals in a *state of nature*, and create a *society* by establishing a *contract* whereby they agree to live together in harmony for their mutual benefit, after which they are said to live in a *state of society*. This contract involves the retaining of certain *natural rights*, an acceptance of restrictions of certain *liberties*, the assumption of certain *duties*, and the pooling of certain *powers* to be exercised collectively.

The social contract is very simple. It has only two basic terms: (1) **mutual defense of rights**; and (2) **mutual decision by deliberative assembly**. There are no agents, no officials, that persist from one deliberative assembly to another. The duties of the social contract are *militia*. There may be customs that persist from assembly to assembly, such as customs for due notice, parliamentary procedure, judicial due process, and enforcement of court orders by militia. This second term could be called the constitution of society, but it precedes a constitution of government and should not be confused with it.

There is also a constitution of nature that precedes both the constitution of society and the constitution of government. It is also convenient to speak of a constitution of the dominion that follows the constitution of society and precedes the constitution of government. It arises after a society is created (by adopting the social contract), and after it acquires exclusive dominion over a well-defined territory. That is when we get things like a right to remain at and to return to one's birthplace, which makes no sense for a society with no territory (such as nomads).

A constitution of government, such as the Constitution of 1787, is the next step in the development. It is to establish institutions, offices, procedures, duties, and structures that persist from one assembly to another that are not just customs. It is at that point that we begin to get things like laws, and paid agents and officials, whose jobs continue beyond transient assemblies. We also get taxes, standing armies, and professional law enforcers.

Such pooled powers are generally exercised by delegating them to some members of the society to act as agents for the members of the society as a whole, and to do so within a framework of structure and procedures that is a *government*. No such government may exercise any powers not thus delegated to it, or do so in a way that is not consistent with established structures or procedures defined by a basic law which is called the *constitution*.

While it is possible in principle for such a constitution to consist entirely of a body of unwritten practices, traditions, court decisions, and long-established statutes, in practice no such basic order can be considered secure against confusion or corruption if it is not primarily based on a written document, which prescribes the structure, procedures, and delegated powers of government, and the retained rights of the people, and which is strictly interpreted according to the original intent of the framers.

Although in principle the procedures may allow for the direct adoption of legislation by vote of the people, this is both impractical and potentially dangerous, especially to the rights of minorities, so that it is generally best that most legislation require approval at some point in the legislative process by a deliberative assembly, a body of *elected representatives* rather than by *direct popular vote*, and that any such legislation be subject to *judicial review*, whereby legislation not consistent with the constitution can be voided. Such a form of government is called a *republic*, as distinct from a *democracy*, in which all legislation is adopted solely by direct popular vote. And if it operates under a well-designed constitution, it is a *constitutional republic*.

It is important that the deliberative assembly fairly represent all the competing interests of the people, so that the concerns of minorities can be weighed and not ignored. But fair representation is insufficient if deliberation is not effective in analyzing and anticipating all the consequences of any decisions that might be made. The consent of the majority should be *necessary* for action, but that consent should never be *sufficient* for action.

Origins of the Social Contract

Critics of social contract theory argue that almost all persons grow up within an existing society, and therefore never have the choice of whether to enter into a social contract. Not having a choice, they say, makes any such contract void.

The original proponents of the social contract theory, John Locke, David Hume, and Jean-Jacques Rousseau, answered these critics, but not in a way that is entirely satisfactory. To understand how the social contract comes about, we need to look at the kinds of contract that prevail during each stage in the development of a human being in society.

Each of us begins life under the terms of a special kind of social contract called a *filial contract*, between a child and his parents, and by extension to his siblings. That contract is established at the moment of bonding between parents and child following birth, and the terms of the contract are that the child will provide the parents certain pleasures that come with parenthood, particularly the satisfaction of helping to form a happy and admirable adult, and support for the

parents in their later years, and in turn receives their love, support, guidance, and protection during childhood.

Although a filial contract can exist in a family that is isolated from any larger society, when the parents join a society, they pool their rights and duties as parents with other members of that society, and thereby become agents of the larger society in the raising of their own children, and accountable to that larger society for doing so properly.

As a child grows, it encounters other members of the larger society, usually beginning with other children. Whenever any two or more individuals meet with the understanding and expectation that they will live together in harmony and not fight with one another using any available means, they are establishing a social contract among themselves. In most cases they will be contracting with persons who have already established such a contract with still other persons, so that the terms of the contract are not only to live in harmony with those in direct contact, but also with all those with whom each of the parties is already engaged in a social contract, and by extension, to all others that those are in a social contract with, and so on. In other words, the social contract is*transitive*: if *a* is in a social contract with *b*, and *b* with *c*, then *a* is in a social contract with *c*. In this way each of us is bound under a social contract with all the other members of the society, most of whom we have never met.

As a person makes the transition from childhood to adulthood, his obligations change to match his abilities, and the filial contract gives way to the larger social contract and obligations to larger communities at the local, provincial, national, and global levels.

Of course, the social contracts of several societies may not extend to one another, giving rise to tribes or nations, whose members are bound by social contract within their membership, but are in a state of nature with respect to one another. If that state of nature involves active conflict, whether at the individual, tribal, or national level, it is said to be a *state of war*.

Breaches of the Social Contract

Although the situation of there never having been a social contract is a fairly simple one, the situation of either deceiving another into thinking there is a social contract between them, or of entering into a social contract and then violating its terms, can be much more complicated, and much of law and government is concerned with dealing with such situations.

In his treatment of the subject, Locke tended to emphasize those violations of the social contract that are so serious that the social contract is entirely broken and the parties enter a state of war in which anything is permitted, including killing the violator. Today we would tend to place violations on a scale of seriousness, only the most extreme of which would permit killing. Some would even go so far as to exclude killing for any transgression, no matter how serious, but that extreme view is both unacceptable to most normal persons and subversive of the social contract itself, which ultimately depends not on mutual understanding and good will, but on a balanced distribution of physical power and the willingness to use it. Sustaining the social contract

therefore depends in large part on so ordering the constitution and laws as to avoid unbalanced or excessive concentrations of power, whether in the public or the private sector.

Checks and Balances

The framers of the U.S. Constitution addressed the problem of avoiding unbalanced or excessive concentrations of power in government by adopting a constitution in which legislative, executive, and judicial powers are largely divided among separate branches, with each having some power to check the abuses of the others. Legislative powers were further divided between two legislative bodies. Some powers were delegated to the central national government, which others were reserved to the component states or the people.

Around the end of the 19th century, however, it became increasingly apparent that excessive and unbalanced concentrations of power in the private sector could subvert the system of checks and balances in government, and the first anti-trust laws were passed to try to provide a check on those undue influences. Unfortunately, such legislation has not been entirely effective, and we now face a situation in which to an intolerable degree the real powers of government are being exercised not by constitutional bodies but by secret cabals based in the private sector but extending throughout government, cabals which are increasingly coherent and increasingly abusive of the rights of the people, including the right to have government be accountable to them and not to a power elite.

The continued constitutional development of this society will therefore require the development of a new, more sophisticated system of checks and balances that extends throughout the private sector as well as the public and does not entirely rely on market forces.

Much of the abuse that has developed arises from the assumption by the national or central government of powers not delegated to it under the Constitution, and the erosion of the powers of the States with respect to that central government. Some of those powers are arguably best exercised by the central government, but without constitutional authority even the exercise of reasonable powers becomes an abuse and leads to an escalating cycle of abuses as more and more people resist such intrusions, creating a crisis of legitimacy not only for those unconstitutional activities but for the constitutional ones as well. If government is to be brought into compliance with the Constitution, then there will have to be a carefully planned program of repealing or overturning unconstitutional legislation and official acts, combined with a number of amendments that will provide the needed authority for legislation and acts which are best exercised by the central government, and the re- enactment of legislation based on such amendments. That will leave a difficult problem of dealing with all those actions conducted without constitutional authority before the amendments are adopted. Making the amendments retroactive is not permissible under constitutional principles, which exclude not only *ex post facto* laws but *ex post facto* amendments as well.

Of Rights Natural and Constitutional

Under the theory of the social contract, those rights which the individual brings with him upon entering the social contract are *natural*, and those which arise out of the social contract are *contractual*. Those contractual rights arising out of the constitution are *constitutional* rights. However, natural rights are also constitutional rights.

The fundamental natural rights are *life, liberty, and property*. However, it is necessary to be somewhat more specific as to what these rights include. Therefore, constitution framers usually expand them into such rights as the right of speech and publication, the right to assemble peaceably, the right to keep and bear arms, the right to travel over public roadways, and so forth. The exercise of such natural rights may be restricted to the extent that they come into conflict with the exercise of the natural rights of other members of society, but only to the minimum degree needed to resolve such conflict.

Such natural rights are *inalienable*, meaning that a person cannot delegate them or give them away, even if he wants to do so. That means that no constitutional provision which delegated to government at any level the power to take away such rights would be valid, even if adopted as an amendment through a proper amendment process. Such rights apply to all levels of government, federal, state, or local. Their enumeration in the constitution does not *establish* them, it only *recognizes* them. Although they are restrictions on the power of government, the repeal of the provisions recognizing them would not remove the restrictions or allow the delegation of any power to deny them. The people do not have that power, and therefore cannot delegate it to government.

Yet constitutions recognize the power to deprive persons of their rights under *due process* of law. Strictly speaking, a person may not be deprived of such rights in the sense of taking them away. Natural rights are never lost. Their exercise can, however, be restricted or, to use the proper legal term, *disabled*. While some might question the practical distinction between losing a right and having it disabled, that distinction is important. A right which is disabled under due process may also be re- enabled by the removal of that disability, and the disability is removed if the social contract is broken and persons return to the state of nature.

Due process is not defined in the written U.S. Constitution, which points out the fact that the constitution consists not only of the written document itself, but the body of court precedents, legal definitions and traditions, and prevailing civic processes as of the date the written document was ratified, which is called pre-ratification *Common Law*. It also includes the commentaries and records of the debates of the framers and ratifiers insofar as they provide guidance on how to interpret the provisions of the written document. The constitution is further expanded to include the body of court precedents since ratification which interpret its provisions, called post-ratification common law, but only insofar as those court precedents are consistent with the written document, pre-ratification Common Law, and the original intent of its framers and ratifiers.

Certain rights, therefore, such as the rights of due process and the right to vote, are contractual. They have no meaning in a state of nature, only within the context of a civil society. And they are defined within Common Law rather than in the written Constitution.

Due process requires, among other things, that any disablement of a right be done only by a court of competent jurisdiction in response to a petition to do so, and after arguments and evidence are heard from all sides to support or refute the granting of such petition. The only rights which may be disabled by statute and without a specific court proceeding are the rights of *majority*, or adulthood. Common Law recognizes that persons are born with disabilities of minority, and constitutions and laws typically define some age at which those disabilities are removed, such as age 18 in the United States for purposes of voting, although it may allow for such disabilities to be removed earlier, or retained past the usual age of majority, upon petition to do so.

Due process therefore requires that each and every right which is to be disabled be argued separately on its merits, and the ruling or sentence of the court explicitly disable each such right.

This requirement therefore comes into conflict with legislation which prescribes the disablement of certain rights for persons convicted of certain types of crimes, such as the right to vote or to keep and bear arms, without that disablement being made an explicit part of the sentence or the sentencing hearing. Such legislation must be considered unconstitutional, for even though there may be due process in the case which results in the explicit disablement of the rights to certain liberties or properties, those disablements are openly stated and argued, and the statutory inclusion of other disablements that are not made explicit or separately argued is a denial of due process.

Duties under the Social Contract

While a constitution prescribes the legal rights of individuals and the powers of government, the social contract also includes certain duties which members assume upon entry. Those duties include the duty to avoid infringing on the rights of other members, to obey just laws, to comply with and help enforce just contracts, to serve on juries, and to defend the community.

It is important to recognize that although individuals have a right of self-defense in the state of nature, when they enter into society under the social contract, the pooling of that right transforms it into a duty to defend the community, and therefore to risk or sacrifice one's life, liberty, or property if such defense should require it. The right of self-defense is no longer supreme, although it survives the transition to society as a duty to defend oneself as part of the community. Pacifism in the face of mortal danger to oneself or others is therefore not consistent with the social contract, and persons who insist on that position must be considered not to be members of society or entitled to its benefits, and if they live in the same country, have the status of resident aliens.

This duty implies not only individual action to defend the community, but the duty to do so in concert with others as an organized and trained militia. Since public officials may themselves pose a threat to the community, such militias may be subject to call-up by officials, but may not be subject to their control except insofar as they are acting in accordance with the constitution and laws pursuant thereto, and in defense of the community. Since any official designated to call up the militia may be an enemy of the constitution and laws, and may fail to issue a call-up when

appropriate, militias must remain able to be called up by any credible person and independent of official control.

Another important duty is jury duty. Since officials may be corrupt or abusive or their power, grand jurors have the duty not only to bring an indictment upon evidence presented to it by a prosecutor, but to conduct their own investigations and if necessary, to appoint their own prosecutors to conduct a trial on the evidence. Petit jurors have the duty to not only follow the instructions of the judge to bring a verdict on the "facts" in a case, but to rule on all issues before the court, overriding the judge if necessary. No matter how despicable an accused defendant might be or how heinous his acts, they have the duty to find that accused not guilty if the court lacks jurisdiction, if the rights of the accused were seriously violated in the course of the investigation or trial, or if the law under which the accused is charged is misapplied to the case or is unconstitutional; and to find the law unconstitutional if it is in violation of the constitutional rights of the accused, if it is not based on any power delegated to the government, if it is unequally enforced, or if it is so vague that honest persons could disagree on how to obey or enforce it. Since most jury instructions now discourage petit juries from exercising that duty, almost all convictions brought by such juries in which there was an issue in law must be considered invalid, due to jury tampering by the court.

Governmental Powers and Duties

Some critics of social contract theory argue that there are some powers of government that are not derived from powers of the people or delegated to the government by them. However, a careful analysis will show that all powers exercised by government derive either from the people as a whole, or from some subset of the people, or from one person, and that only the first are legitimate. The power to tax? Persons in the state of nature have the power to tax themselves, although they would not ordinarily think of it that way.

Most written constitutions prescribe the powers delegated to government, but are not always explicit about the duties. It is implied that the government has the duty to exercise its powers wisely and pursuant to the purposes of the social contract. But some persons argue that the power to act is also the power not to act. Could the government choose not to exercise its power to conduct elections, or to defend the country, or to maintain a sound currency, or to organize and train the militias of each state? No. Except in case of emergency, and only for the duration of the emergency, government must exercise the powers delegated to it according to their purposes to the best of its ability. That is its duty. Just as it is the duty of every member of society to exercise his or her powers in service of the community.

References:

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[] Bernard Schwartz, *The Roots of the Bill of Rights*, Chelsea House, New York, 1980.

[] Leonard W. Levy, *Original Intent and the Framers' Constitution*, 1988, Macmillan, New York. Scholar examines "original intent" doctrine and its alternatives.

[] Stephen P. Halbrook, *That Every Man Be Armed*, 1984, Independent Institute, 134 98th Av, Oakland, CA 94603.

[] Clarence Streit, *Atlantic Union Now*, 1962, Freedom & Union Press, Washington, DC.

Related works:

- **The Mayflower Compact** (1620) — One of the first expressions of the social contract in written form.
- ***Leviathan***, Thomas Hobbes (1651) — Laid basis for social contract theory, providing branching point for the theories of constitutionalism and fascism.
- ***The Law of Nature and of Nations***, Samuel Pufendorf (1674, tr. Basil Kennett 1703) — Derived justice and the law of nations from natural law.
- ***Second Treatise on Government***, John Locke (1689) — Principal proponent of the social contract theory which forms the basis for modern constitutional republican government.
- ***The Spirit of Laws***, Charles de Montesquieu, (1748, tr. Thomas Nugent 1752) — Laid the foundations for the theory of republican government, particularly the concepts of the separation of powers into legislative, executive, and judicial, a federal republic, representatives elected from political subdivisions, a bicameral legislature, and a system of checks and balances.
- **Articles of Association** (1774) — Protest of British acts resulted in this prelude to the Articles of Confederation.
- **Articles of Confederation** (1777) — First attempt to form a common government for the newly independent states.

Supplement as of 2007

Upon further reflection since the above was written in 1994, several points might be clarified or further developed:

There are four constitutions

It is useful to discuss the concept of social contract in terms of there being **four** constitutions:

1. The constitution of *nature* – comprised of all those principles called the laws of nature, including the ways living beings, by their nature, tend to behave, usually as a survival strategy for their genes;
2. The constitution of *society* – comprised of the natural rules according to which social groups tend to make decisions, before they establish formal structures of government. These include such principles as decision by conventions called by public notice and conducted according to customary rules of parliamentary procedure, perhaps combined with public referendum;
3. The constitution of *dominion* – the society in exclusive possession of a territory, which defines things like fair representation based on location.
4. The constitution of *government* – probably written, as a fundamental law adopted as a legislative act under the constitution of the state.

Each of these constitutions is subject to the ones before it. So a statute is unconstitutional if it violates any of the above constitutions, of government, dominion, society, or nature. A provision of a written constitution of government is unconstitutional if if violates the natural, social, or dominion constitutions, and a practice under the social or state constitution is unconstitutional if it violates the natural constitution.

Consent

Some confusion arises from the use of the term "social contract", because it is not a commercial contract, requiring express, informed consent. That confusion was already recognized in the Founding Era, when some, such as James Madison, preferred to use the term "compact". The term is used, however, in sociobiology, as synonymous to symbiosis, and a 17th century political philosopher, Johannes Althusius, used that term. The use of the term "contract" by such political philosophers as John Locke may have been to recognize that among human beings symbiotic arrangements have a contractual nature.

To understand why it is correct to hold that a person consents to the rules of a society whose territory he enters or in which he remains beyond the age of majority, it is important to understand that while a society may be just a collection of people bound by a social compact, when it asserts dominion over a territory it becomes a *dominion*, and it is as a dominion that it adopts a constitution of government and makes laws binding on those present on its territory. Whenever anyone enters into the territory of a society with the consent of that society one is consenting to be bound by the rules of that society, even if it consists of a private household, provided that those rules are constitutional, in the sense of being consistent with all three levels of constitution. No one can consent to being bound by unconstitutional rules, but he does consent to being bound by constitutional rules. The only requirement is due notice that he has entered into the territory of a society, or that the territory on which he stands is asserted to be part of the

dominion of the society. If he refuse to abide by constitutional rules of a society, then he is at war with that society.

Militia

The original meaning of the term militia, from the Latin, was not a body of armed men, but an activity, which is often translated as "military service". However, since those engaged in militia also did things like respond to disasters and perform other public services, such as law enforcement, it is more accurate to translate it as "defense activity". It was the common idiom of English in the 18th century to use the same word for an activity and for those engaged in it, and this was done with the word militia, to the point where this secondary meaning became more prominent than its original primary meaning as an activity. However, most of the leading Founders were Latin-literate and can be expected not to have used a Latin word in a way that was inconsistent with its meaning in Latin, and if we substitute the phrase "defense activity" for "militia" in most of the instances of its use, their meaning becomes clear. However, it is also important to realize that in that era people often did not distinguish between different meanings of a word as dictionary writers were to do, but to use words with several blended meanings that the reader or listener was expected to understand in context. Thus, a term like "militia" could mean for the Founders both defense activity, and those engaged in it, at the same time. In modern times, under the influence of dictionaries, beginning with Samuel Johnson's *A Dictionary of the English Language*, 1755, we tend to choose one of the several meanings a word might have, but it was not until Noah Webster's 1806 *A Compendious Dictionary of the English Language* that this influence began to become pervasive.

Properly understood in this way, the duties under the social contract are essentially synonymous with the militia duty, and jury duty can be understood as a specialized form of militia duty, the duty not just to defend one's own rights, but also the rights of others, under the principle that any infringement of the rights of any person is an infringement of the rights of all. This is reflected in the common law prerogative writs, such as *quo warranto*, *habeas corpus*, *mandamus*, *prohibito*, *procedendo*, *scire facias*, and *certiorari*, any of which could, originally, be sought by any person on behalf of any other, regardless of whether the petitioner was directly or personally injured.

Origins of rights

Different rights originate from different levels of constitution, as discussed above. Some of the main ones are:

Nature
- Life
- Limb (right not be be physically injured or tortured, or have one's health or comfort threatened)
- Liberty
- Acquisition, retention, and use of means to secure above rights (part of property right)
- Right not to be required to do the impossible or scientifically irrational

Society
- Property equity (right to reclaim property to which one has title, or the value thereof, beyond mere possession)
- Presumption of nonauthority
- Due process (includes due notice and fair hearing, both substantive and procedural, and all rights associated with juries)
- Common law trust rights
- Public decision by convention called by public notice and conducted by established rules of procedure

Dominion
- Denizenship (right to remain on or return to one's domicile)
- Fair representation of different parts of the territory

Government
- Citizenship (privilege to vote and hold office, access to voting and fair counts)
- Means to remove misbehaving officials or suspend their actions, such as *quo warranto* and other prerogative writs
- Getting reports on the activities and expenditures of officials
- Compensation for taking of property (part of property right)

Thus, the property right is actually a bundle of rights, part of which are natural, and part social, in origin. It can also be governmental in origin, as with things like intellectual property, that is established by statute.

In his introduction in Congress of the proposed articles that became the Bill of Rights, James Madison made an important distinction:
Trial by jury cannot be considered as a natural right, but a right resulting from a social compact which regulates the action of the community, but is as essential to secure the liberty of the people as any one of the pre-existent rights of nature.

He did not distinguish the rights arising from the society with dominion over a territory, but had the notion been introduced one suspects the Founders would have seized on it.

Distinction between public rights, privileges, and immunities

The U.S. Constitution uses the term "right", but as Madison explained in some of his later writings, the natural, social, and dominion rights, as broken out above, are rights against the actions of government, for which the term "immunity" is more accurate. Under this understanding, every immunity is a restriction on the delegated powers of government, and every delegated power a restriction on immunities. Together, they partition the space of public action, with immunities and powers being complements of each other. The rights created under the Constitution of government are then more accurately referred to as "privileges". All of these are public rights, to distinguished from the private rights that arise from things like contracts. The use of the phrase "privileges and immunities", used in the Constitution, or "privileges or immunities", used in the 14th Amendment, is therefore to be understood as a more precise way to express the legal concepts involved.

However, the terms "privileges" and "immunities" properly only have meaning after government is established. In the state of nature, before government, these rights exist only as claims, demands, or practices. In the state of society, or a dominon with a territory but not yet a government, they exist only as traditional concessions among individuals, or as unspoken private contracts, perhaps decidable by a court but enforceable only by custom and private voluntary action. It is only after government is established that they become *legal* claims, enforceable by *official* action.

Within government, there are different kinds and degrees of privileges.
Those *nondiscretionary* privileges conferred by the constitution of government may be suspended only by amendment to the constitution, those conferred by statute only by repeal of the statute, and those conferred by regulation only by repeal of the regulation. That leaves *discretionary* privileges conferred by the discretion of officials or agents, which may be denied to any individual at any time upon the whim of those holding the position. Tyranny typically emerges as attempts to reduce immunities or nondiscretionary privileges to discretionary privileges.

The above are all *public* rights, to be distinguished by *private* rights that can arise from private contracts, which are different in important ways from public contracts like the social contract. Private contracts can create entitlements to receive some quantity of some benefit. Public contracts, in general, can not. One of the ambitions of redistributionist tyranny is to treat such private contracts as public, legalizing a demand for delivery of a sufficiency of some scarce resource. This is a violation of the natural law that one cannot be commanded to do the impossible. Delivery of a sufficient quantity of a scarce resource may be possible under some conditions of abundance, for a short period of time, but it is generally not possible to sustain that over a long period of time. Attempts to entrench such entitlements in a written constitutions of government is poor constitutional design.

The U.S. Constitution is not a contract

A common misconception is that the U.S. Constitution, or other such constitution of government, is a "contract between government and the people". It is not. The mistake has an origin in the ancient notion of a covenant between a ruler and a god, or a ruler and the people, but that is something entirely different. A moment's reflection should reveal that "government" can't be a party to a contract that creates it. Parties to contracts have to pre-exist those contracts.

The U.S. Constitution is a law. It proclaims itself as such, as the Supreme Law. A law is not a contract, although it can, and that one does, define contracts under which its officials will be bound. The election or appointment of each official is a separate contract. Not only do officials not constitute a separate corporate entity, with interests of its own, in competition with the people, but the original design is that they not be allowed to function that way, and that they have a duty not to do so.

The question then is, if the U.S. Constitution is the Supreme Law, and there is no law without a sovereign, then who is the Sovereign, the supreme lawgiver? The People? Yes, but not directly.

It is the people acting through conventions in each dominion, initially deciding to adopt the Constitution by a vote of 9 of the 13 state (dominion) conventions, and subsequently to amend it by votes of 3/4 of the state conventions. (After initial ratification, but not before, state legislatures were empowered to act as state conventions for purposes of amendment.)

If the social contract that created the society, for which the Constitution of government specifies the government, was not created by that Constitution, then what is the social contract that did? The answer is, temporarily, the Articles of Association cited above, and permanently, the Articles of Confederation. Each dominion had been created a society by its own social contract. The Confederation bound them together as a single society.

So is the United States a society of states, as southern secessionists would later argue, or a society of people? That question provided the theoretical basis for the 1861-65 War of Secession, so it needs to be answered, better than it had been at that time. The answer, of course, although it is complex and unsatisfactory to many, is that it is a society of people voting by state through convention. The subtle distinction that needs to be understood is that voting by state doesn't make it a society of states, considered as persons party to a contract. Conventions are not corporate persons, and neither are state legislatures when they sit as conventions. It is when a deliberative assembly adopts a law that is carried into execution that it becomes the lawmaking branch of a corporate person, but each office is a separate corporate person, distinct from the official holding it. Therefore, it is strictly correct to sue an office for actions within its jurisdiction, or an official holding that office for actions not within his jurisdiction, but not the state as a whole. Both invoke the duty of *respondeat superior* if there has not been due diligence in supervising the actions of the office or official.

The essence of the social contract

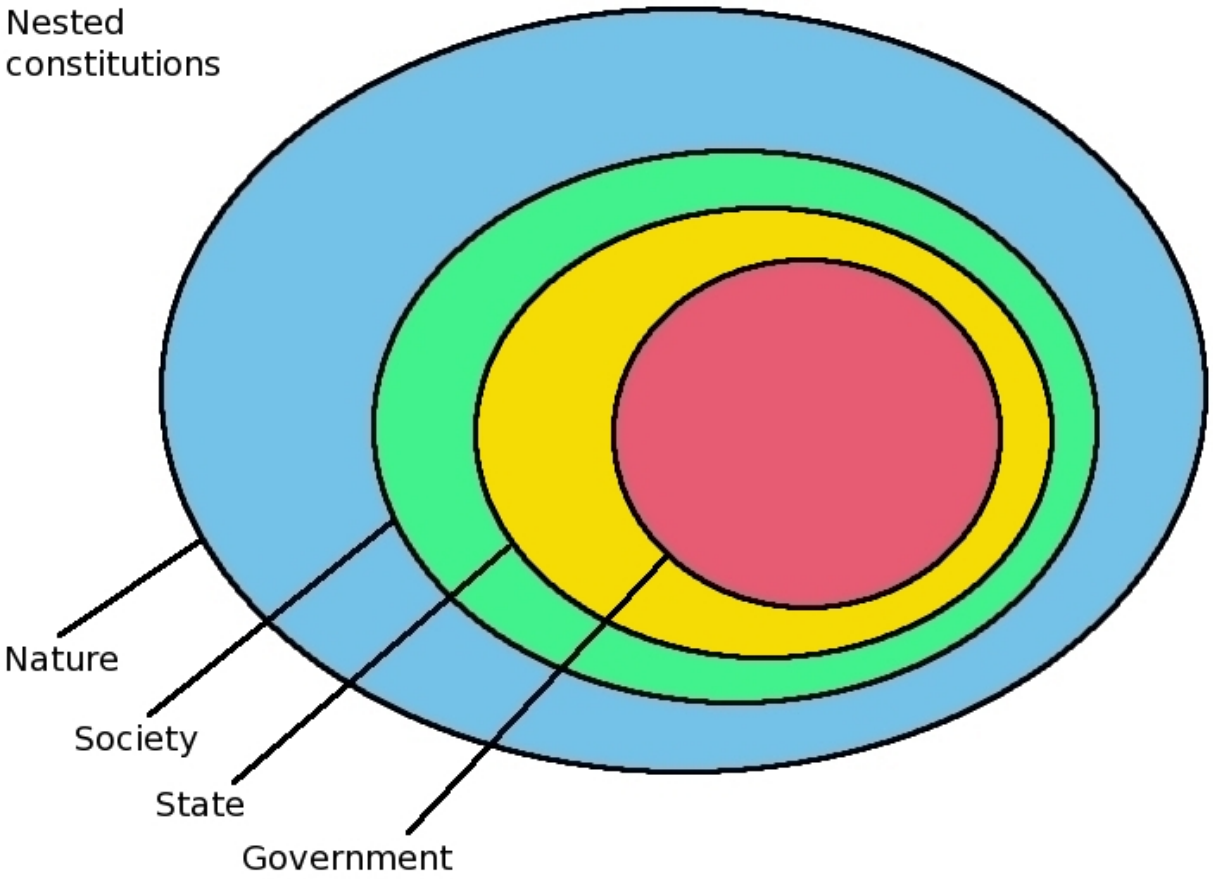
Normally, social contracts are informal and unwritten. There is historical precedent in the use of "articles of association". essentially, a social contract is very simple. It can be reduced to:

"We the undersigned hereby mutually agree to mutually defend one another's rights, and bind our heirs and successors to do the same."

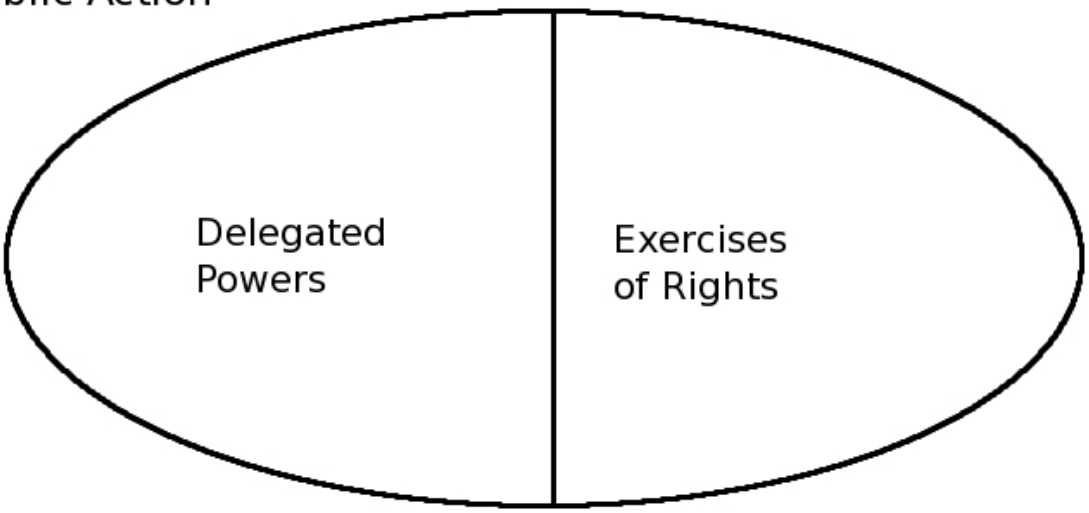
If the society has a territory, so that it is a dominion, the statement could be reduced to:

"We the [name] society hereby assert our dominion over the territory [description]."

These could be elaborated upon, but they are sufficient for many purposes.

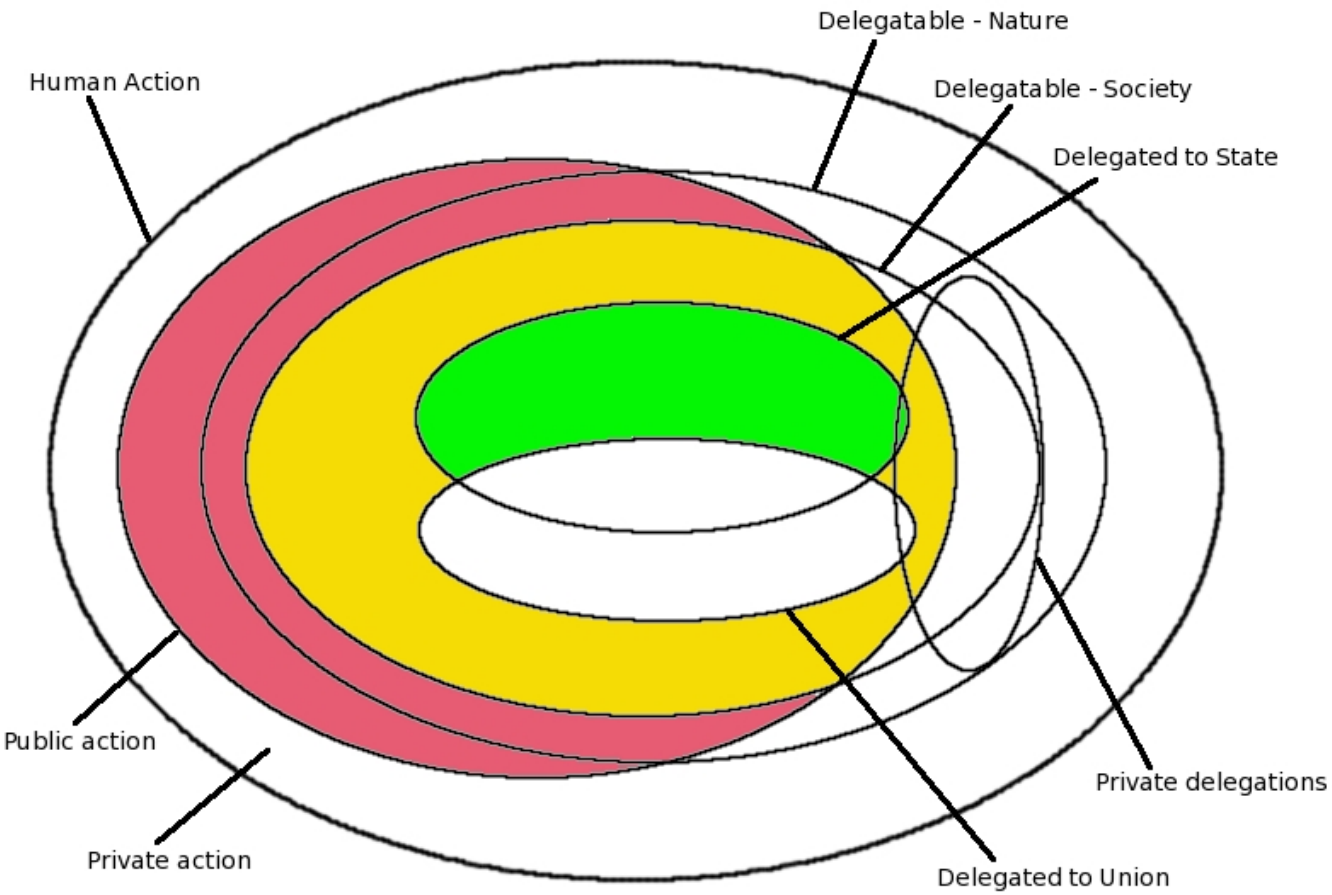

Nested
constitutions
Nature
Society
State
Government

Public Action



Each delegation of a power restricts rights.
Each declaration of a right restricts delegated powers.

A right (immunity) may be expressed as a restriction
on a power, and a power as a restriction on a right.



See also:

- 🟥🟦 **Presumption of Nonauthority and Unenumerated Rights**, by Jon Roland, Begun November 6, 2005, in progress.